SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 381.

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,
Petitioner,

vs.

NEEDHAM PACKING COMPANY, D/B/A SIOUX CITY DRESSED BEEF, A CORPORATION,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

Petitioner, Local Union No. 721, United Packinghouse, Food and Allied Workers, AFL-CIO, prays that this Court grant rehearing of its order of October 9, 1967 denying the Petition for a Writ of Certiorari to the Supreme Court of Iowa. Upon rehearing, Petitioner prays that a Writ of Certiorari issue to review the judgment of that Court as asked in the Petition filed July 17, 1967.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

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1. The Iowa Supreme Court's refusal to obey the mandate of this Court raises serious questions as to this Court's responsibility for enforcing its own mandates to the lower courts.

2. If the decision of the Supreme Court of Iowa is allowed to stand, it will threaten to destroy the benefits of and materially to impair the methods of labor arbitration. As a result of the manner in which the Iowa Court decided and disposed of this case, arbitrators henceforth will very likely refuse to write appropriate opinions explaining their awards.

3. It is beyond dispute that the Iowa Court grossly distorted the arbitration decision. If an arbitration decision can thus be misread and vacated, without any recourse by the parties, a serious blow will have been struck at the arbitration process, since other courts may be emboldened to employ the same technique of distortion to frustrate awards. The serious questions thus raised extend far beyond the scope of the present case.

DISCUSSION.

1. The Iowa Supreme Court's refusal to obey the mandate of this Court raises serious questions as to this Court's responsibility for enforcing its own mandates to the lower courts.

The Iowa decision, as the dissenting Justices of the Iowa Court strongly suggest, represents an evasion by the Supreme Court of Iowa of "the clear mandate" of this Court in the same case (376 U. S. 247).

This Court held in 1964 that the Respondent's allegations that Petitioner had breached the no-strike clause "did not release Needham from its duty to arbitrate the Union's claim that employees had been wrongfully discharged." 376 U. S. 247, 253. In the arbitration which was held following this Court's decision, the Arbitrator, Harold Davey, *upon consideration of a fully-developed record,* ruled that Needham was not relieved of its obligation to arbitrate.

Nevertheless, in flat contradiction to this Court's decision on the same grievance, and with essentially the same factual situation, the Iowa Court has held, in the proceedings to enforce the arbitration award, that "It cannot be implied that the arbitration clause was intended to include an agreement to arbitrate the return to work after an illegal strike when a strike was prohibited under the terms of the agreement." (Appendix I, p. 35.)[1]

The Iowa Court's intermeddling with this Court's mandate is not only improper, it represents the very kind of

1. "Appendix I" refers to the appendix to the Petition filed July 17, 1967, while "Appendix" refers to the appendix to the present Petition.

lower-court action which has traditionally been regarded as grounds for application for relief in this Court. As the Court said in *Sibbald* v. *United States,* 12 Pet. (U. S.) 488, 492 (1838):

> Whatever was before the Court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent or intermeddle with it, futher than to settle so much as has been remanded.

See also *N. A. A. C. P.* v. *Patterson,* 360 U. S. 240 (1959); *Martin* v. *Hunter's Lessee,* 1 Wheat. (U. S.) 304 (1816); *Maguire* v. *Taylor,* 17 Wall. (U. S.) 253 (1872), and *Re Blake,* 175 U. S. 114 (1899), which observed that a petition for a writ of error, rather than a petition for mandamus, was the appropriate proceeding to compel obedience by a state court to this Court's mandate.

The Iowa Court's disregard, and virtual overruling, of this Court's decision, raises issues of such magnitude concerning proper and orderly judicial administration and of the supremacy and enforceability of this Court's mandates that Petitioner believes the Court should grant the Petition and consider these questions in the context of a full record and full argument by the parties.

2. If the decision of the Supreme Court of Iowa is allowed to stand, it will threaten to destroy the benefits of and materially to impair the methods of labor arbitration. As a result of the manner in which the Iowa Court decided and disposed of this case, arbitrators henceforth will very likely refuse to write appropriate opinions explaining their awards.[2]

2. It is clear, for example, that there was no compulsion upon the Arbitration Board in this case to prepare an opinion. Nonethe-

Even though the Iowa Court is guilty of reviewing and interpreting the merits of the award to a degree prohibited by Federal law,[3] its decision shrouds the accomplishment of this forbidden task in what can only be regarded as a veil of distortion and unfaithful representation of the Arbitrator's decision.

The description of the Arbitrator's decision appearing in the Iowa Court's opinion is altogether different from the Arbitrator's actual decision. Having distorted the Arbitrator's opinion almost beyond recognition, so as to make it appear that the Arbitrator said what he did not say, the Iowa Court then subjected what it alone had constructed to the kind of fly-specking examination ordinarily reserved for instruments such as trust indentures. It then concluded that the Arbitrator had exceeded his jurisdiction.

The simple fact is that had Arbitrator Davey not undertaken to write a conscientious opinion fully explaining and giving the reasons for his award, but had confined himself to a statement of the award itself, *the Iowa court could not possibly have reached the result it did.* For there would then have been nothing for the Iowa Court to distort, quote out of context, or pick apart.[4]

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less, the Board considered that a full opinion was desirable, for, as Chairman Davey noted: "The Arbitration Board further *agreed that because of the importance of this proceeding* the Chairman should prepare an Opinion to accompany the Award which would treat all relevant matters 'fully but economically'." (Appendix, p. 5) (Emphasis added.)

3. *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *Steelworkers* v. *Enterprise Wheel and Car Corporation*, 363 U. S. 593 (1960).

4. Because the degree of the Iowa Court's distortion of the Arbitrator's decision is virtually impossible to appreciate without a thorough reading of the arbitration decision, that decision is reprinted in its entirety as an Appendix to this Petition. Certain portions of the decision, which serve to illustrate what the Arbitrator in fact decided (in contrast to what the Iowa Court said

This Court stated in *Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593, 598:

> Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.

No responsible authority or commentator has questioned the wisdom of this Court's endeavoring to guard against the possibility that arbitrators might refrain from writing opinions.[5] In fact, the value of arbitrators' opinions has been repeatedly emphasized by numerous authorities in the labor relations field, including the following:

> A well reasoned opinion can contribute greatly to the acceptance of the award by the parties by persuading them that the arbitrator understands the case and that his award is basically sound. Then, too, such awards can have significant educational value to the parties and can aid them in adjusting future related problems. Elkouri and Elkouri, How Arbitration Works 168 (Rev. ed. 1960).
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> * * * * *
>
> Many companies and unions are making excellent educational use of arbitration decisions in training foremen and stewards in the art of contract administration . . . To be usable [for this purpose], the opinion must set forth in clear and orderly fashion (a) the nature of the grievance, (b) the contract clause(s) involved, (c) the issue(s) to be decided, (d) the basic arguments

that he decided) are rendered in bold-face type in the reprint in the Appendix. All italicization (appearing as underscoring in the bold-face portion in the Appendix) are as in the original.

5. Professor Wellington, in fact, believes that arbitrators *should be required* to write opinions, although his position as to the proper role of a court in an enforcement proceeding appears to differ from this Court's views. *Judicial Review of the Promise to Arbitrate*, 37 N. Y. U. L. Rev. 471, 483 (1962).

> of the parties, and (e) a full statement of the arbitrator's reasoning in reaching his decision. Davey, *Labor Arbitration: A Current Appraisal,* 9 Ind. and Lab. Rel. Rev. 85, 90-91 (1955).

In summarizing the purposes of an arbitration opinion, M. H. Syme, in an address to the University of Pennsylvania Labor Relations Council, in 1950, concluded as follows (15 L. A. 953, 957-958):

> First, an award must be mutually acceptable. That does not mean that both parties must like it or that either party must be enamored of it. It does mean both parties must feel that the Arbitrator has understood the problem; that he has understood the industry; that his decision has not been alien to the employer and to the employees . . . Second, the opinion must show that the Arbitrator understood the arguments of the parties . . . Third, the opinion may very frequently be used as a vehicle to convey what the Arbitrator does *not* intend to award . . . Fourth, the opinion, if well written and reasoned, can be of assistance to the parties in their future bargaining . . . Fifth, another great contribution of the opinion is its impact on collective bargaining in the hinterland.

In an address, as its President, to the National Academy of Arbitrators in 1964, Arbitrator Sylvester Garrett observed as follows (Proceedings of the Seventeenth Annual Meeting, Nat'l Acad. of Arb. 114, 117):

> It is not enough that a case be decided—the bare decision does not carry conviction to the losing party and others affected by the award. Nor does such a decision provide any guidance to the parties for handling future similar problems. In many cases, the decision may not be as important as the reasons which led to it. The assertion "I don't care whether I win or lose the case; it's what's in the opinion that bothers me" embodies no idle complaint. When the parties are faced with nasty problems of incentive administration, job classification, salary administration, sup-

plemental unemployment benefits, or seniority, they must have reasoned answers which are susceptible to future application in formulating their policies.

In a national survey conducted by University of California Professors Warren and Bernstein, it was found that a full 83% of the 538 employers, management attorneys and consultants, labor union representatives, union attorneys and consultants, and labor arbitrators responding preferred that arbitrators write opinions supporting their awards. Warren and Bernstein, *A Profile on Labor Arbitration,* 4 Ind. and Lab. Rel. Rev. 200, 217 (1951).

If the danger which the Court saw in *Enterprise Wheel and Car* was a real one—that arbitrators might be led to "play it safe" and refrain from writing opinions if courts could sieze upon some ambiguity as a basis for refusing enforcement of awards—*the danger is immeasurably greater if courts are permitted affirmatively to distort and misinterpret conscientious, well-reasoned arbitrators' opinions.*

3. It is beyond dispute that the Iowa Court grossly distorted the arbitration decision. If an arbitration decision can thus be misread and vacated, without any recourse by the parties, a serious blow will have been struck at the arbitration process, since other courts may be emboldened to employ the same technique of distortion to frustrate awards. The serious questions thus raised extend far beyond the scope of the present case.

In all the litigation in this case, including the prior proceeding in this Court, the Respondent advanced one basic contention: *that the action of the employees in engaging in a strike in violation of a no-strike clause constituted a repudiation of the collective bargaining agreement and that the Company was thereby relieved of its obligation to arbitrate grievances complaining of the discharge of those em-*

ployees. The Company has never contended that grievances alleging discharge without just cause were outside the broad coverage of the arbitration clause in its bargaining agreement. *The sole issue as to arbitrability advanced before the Arbitrator by the Company, and thus the only such issue considered by the Arbitrator in his opinion, was whether the Company was relieved of its duty to arbitrate because of the illegal strike.*

The Supreme Court of Iowa completely misinterpreted and misstated the issue as to arbitrability. As a result, *that Court never even considered the Company's argument concerning arbitrability under the collective bargaining agreement.* Instead, the Court erroneously concluded that the grievances related to disputes arising under an oral strike-settlement agreement and not under the collective bargaining agreement, and that the arbitrator had no authority to decide the "issue" which the Iowa Court itself literally invented.

It is crystal clear that the Arbitrator's sole concern with the so-called strike-settlement agreement related to the effect which that agreement had on the "repudiation" defense which the Company had raised with respect to its duty to arbitrate under the collective bargaining agreement. The Arbitrator's holding was simply that the continuation of the strike beyond the time when the Union voted to return to work and notified the Company was the responsibility of the Company rather than of the Union. The Arbitrator held that this continuation of the strike could not, therefore, be considered a repudiation of the basic collective bargaining agreement on the part of the Union and the employees. The basic grievances were arbitrable (*i.e.*, the Company was not relieved of the duty to arbitrate under the collective bargaining agreement), *because the Company itself was primarily responsible for the continuation and duration of the very strike which the Com-*

pany was attempting to construe as a Union repudiation of the collective bargaining agreement (Appendix, pp. 112-14).

The Iowa Court's misreading of the Arbitrator's opinion is readily evident from even a fragmentary comparison of that Court's characterization of the Arbitrator's decision with what the Arbitrator in fact decided.

The Court's opinion states (Appendix I, p. 36):

> The grievance was for the wrongful discharge of employees based on the violation of the "agreed upon terms" for the employees' return to work, not upon the illegal use of total deprivation of seniority. This concept originated with the arbitrator.

This is not true. Two grievances were arbitrated: one involving employee Stamoulis and the other covering the remainder of the work force. As to the Stamoulis discharge, the Arbitrator stated (Appendix, p. 94).

> The Chairman finds that the record amply sustains the Company's contention that the discharge of Stamoulis was for "just cause" *within the meaning of the contract.* (Emphasis added.)

The Arbitrator's finding as to the other grievance, however, was that the discharges were *not* for just cause *within the meaning of the basic contract.* No one, other than the Supreme Court of Iowa, has ever in this proceeding said that the Union was complaining of discharges in violation of an agreement for the return of the strikers.

The Iowa Court stated further that the Arbitrator did not find that the penalty of discharge was "clearly excessive, arbitrary, capricious, or discriminatory" (Appendix I, p. 34). **This is not true.** The Arbitrator found that the Stamoulis discharge was *not* excessive, arbitrary, capricious or discriminatory, and he denied reinstatement of Stamoulis (Appendix, p. 95). However, as to the remain-

ing discharges, covered by the other separate grievance, the Arbitrator held that the discharge penalty *was* excessive; he held that the appropriate penalty was a six-month disciplinary suspension (Appendix, pp. 116-17). Moreover, the Iowa Court's complaint that the Arbitrator failed to use certain specific words (arbitrary, capricious, and so forth) is a convincing demonstration that the Court was reviewing the merits of the award and simply disagreeing with the Arbitrator's conclusions.

Professor Davey, who arbitrated the grievances in this case, was found guilty by the Supreme Court of Iowa of exceeding his jurisdiction and failing to draw the "essence" of his award from the collective bargaining agreement. The irony of his being so chastised is reflected in the following excerpt from one of his many writings in the field:

> I am seriously concerned, however, that the role of the arbitrator, as envisaged in Mr. Justice Douglas' opinion in [*Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960)], may trigger divisive conflict in some quarters as to the proper nature and scope of the arbitrator's authority in grievance arbitration. The Douglas view of the arbitrator's role may encourage those parties who share it to go to court to compel arbitration on matters which, under a proper view of their own contract language, are not in fact arbitrable. . . . Few arbitrators today possess, nor do they desire, the virtually unlimited charter of authority which Mr. Justice Douglas seems determined to grant to them.[6]

It seems most improbable that an experienced labor arbitrator with conservative views of the proper role an arbitrator should play would roam beyond the issues before him under the collective bargaining agreement. If, as we believe is incontrovertible, Professor Davey did not exceed

6. Davey, *The Supreme Court and Arbitration: The Musings of an Arbitrator*, 36 Notre Dame Lawyer 143 (1961).

his jurisdiction,[7] and yet his award can nonetheless be vacated, is there not a real danger that other courts may see in the decision of the Iowa Court a ready means for upsetting arbitrators' awards they do not like?

Conclusion.

As counsel for Petitioner, we would not file this Petition for Rehearing were we not convinced, beyond all doubt, that the Supreme Court of Iowa has done violence to Professor Davey's arbitration decision. Respect for the principles embodied in the *Steelworkers* trilogy virtually demands of us that we make one final effort to bring to this Court's attention the full significance of what has transpired in this dispute since it was last before the Court in March of 1964.

To the extent that the Iowa Court has evaded or intermeddled with this Court's mandate, we believe there is an issue of importance which this Court should hear. To the extent that the Iowa Court's decision may occasion reluctance on the part of arbitrators to write suitable opinions, that decision represents a threat to the continued utility of the arbitration process as a major instrument for furthering Federal labor policy. To the extent that the Iowa Court's decision stands unreversed as a gross distortion of an arbitration decision, it may serve to encourage other courts to do likewise.

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing

7. Certainly the Arbitrator was personally committed to confining himself to the specific grievances arising under the contract. Thus he wrote: "However, the Chairman holds firmly the fundamental view that this Board of Arbitration is hearing and deciding two particular grievances under a particular contract." (Appendix, pp. 118-19.)

be granted and that, upon such rehearing, a Writ of Certiorari issue to the Supreme Court of Iowa.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Counsel for Petitioner.